

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELO SABASTEEN ARNOLD,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 271159

Oakland Circuit Court

LC No. 2005-205408-FC

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and the trial court sentenced him as an habitual offender, second offense, MCL 769.10, to a prison term of 12 to 40 years. Defendant appeals as of right. We affirm.

At approximately 2:30 a.m., on October 29, 2005, Adam Phillips, James Burns, and Carla Edwards were robbed at gunpoint by a group of African-American males on the campus of Lawrence Technological University in Southfield. After the robbery, the robbers drove away in a four-door, maroon car. At 2:44 a.m., Sergeant Lawrence Porter observed a vehicle matching the description of the car. Four African-American males were seated inside. After a high-speed car chase, all four occupants, including defendant, exited the car and fled on foot.

Following defendant’s arrest, police questioned defendant about his role in the robbery. Defendant said that, on the night of the robbery, he drove with three men to an apartment building in Southfield. When asked what happened at the apartment building, defendant answered, “I f---ed up.” Defendant said that, if he explained what he meant by the phrase “I f---ed up,” he would “just f--k himself more.” Defendant also admitted to participating in a car chase and running from the police before his arrest. Later, police found Edwards’ camera and driver’s license in the maroon car observed by Sergeant Porter. Phillips testified that he was able to identify Rodriquez Whorton, one of the car’s four occupants, as the man who robbed him.

Defendant first argues that the trial court should have granted his motion for directed verdict because the evidence presented was insufficient to establish his identity as one of the armed robbers. We review a trial court’s decision on a motion for directed verdict de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A conviction under MCL 750.529 requires the prosecutor to establish that defendant committed an assault and feloniously took property from the victim's presence or person while armed with a dangerous weapon. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Thus, the prosecution must prove defendant's identity as the robber beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime, including identity. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

Here, sufficient evidence on the element of defendant's identity as a perpetrator was presented. First, defendant's appearance on the night of the robbery closely matched the description of the person who robbed Burns. Witnesses to the robbery testified that the person who robbed Burns was an African-American male wearing a tan Carhartt jacket and, possibly, tan pants. Defendant claims that he could not have been the person who robbed Burns because, although he was wearing a tan Carhartt jacket, he was not wearing tan pants on the night of the robbery. While there is a slight discrepancy in the testimony in regard to the tan pants, we do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000).

Next, a reasonable juror could infer from the evidence presented at trial that defendant was present at the scene of when the crime occurred. Police located a car matching the description of the suspect car within 15 minutes of the robbery. Defendant admitted to being inside the car with Whorton, the only robber positively identified by one of the victims. Furthermore, personal possessions belonging to one of the victims were found inside the same car. It is reasonable to conclude that the car located by Sergeant Porter was the same car used by the robbers and that defendant was present for the commission of the robbery. Evidence of opportunity and presence at the crime scene may contribute to a finding of guilt. *People v Barrera*, 451 Mich 261, 295; 547 NW2d 280 (1996); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

Further, the prosecution presented evidence that defendant informed the police that, on the night of the robbery, he "f---ed up," and that if he explained himself further, he would "just f-k himself more." The meaning of defendant's statements presented a question of fact to be resolved by the jury. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

Finally, defendant's flight from the police can support a conclusion that he participated in committing the robbery. Flight is admissible to show consciousness of guilt, *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), and it is always for the jury to determine whether the flight occurred under such circumstances as to evidence guilt. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993). A reasonable juror could conclude that defendant fled from the police because he had a guilty state of mind. The trial court did not err in denying defendant's motion for directed verdict.

Defendant next argues that he is entitled to resentencing. Because defendant did not raise his sentencing issues at sentencing, or in a motion for resentencing, they are not properly preserved. *People v Andre Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Thus, we review this issue for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App

211, 227-228; 646 NW2d 875 (2002); *Carines*, *supra* at 764. Reversal is warranted only if defendant is actually innocent or an “error seriously affected the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 763.

Defendant contends that, in failing to consider his strong family support, history of substance abuse, and rehabilitative potential, the trial court imposed a disproportional sentence and violated constitutional prohibitions against cruel and unusual punishment. We disagree. Contrary to defendant’s assertion, the record reveals that the trial court considered information in defendant’s presentence investigation report regarding defendant’s family and history of substance abuse. Further, in determining whether a sentence is “cruel and unusual,” we consider whether the harshness of the penalty is proportional to gravity of the offense, along with the goal of rehabilitation. *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996). Because defendant’s sentence is within the appropriate guidelines range, however, it is presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Proportionate sentences do not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004). And, habitual offender enhancements do not violate constitutional prohibitions against cruel and unusual punishment. *People v Chandler*, 211 Mich App 604, 616; 536 NW2d 799 (1995), overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996); *People v Potts*, 55 Mich App 622, 639; 223 NW2d 96 (1974). Defendant’s sentence did not constitute cruel and unusual punishment.

Defendant also asserts that he was sentenced in violation of the Sixth Amendment, US Const, Am VI, and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant’s argument is misplaced in light of *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), in which the Court definitively ruled that Michigan’s indeterminate sentencing scheme is not affected by the rulings in *Blakely*, *supra*.

Defendant also argues he is entitled to resentencing because the trial court based his sentence on inaccurate information. Generally, a sentence is invalid when it is based on inaccurate information. MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). However, defendant provides no basis for his claim that the trial court considered inaccurate information in imposing his sentence. Defendant has not specified the particular facts that were allegedly incorrect. Therefore, defendant’s claim is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant further argues that the trial court failed to articulate its reasons for the sentence imposed. The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines. *People v Conley*, 270 Mich App 301, 312-313; 715 NW2d 377 (2006). The trial court noted that defendant is a second felony offender under the habitual offender laws and acknowledged the specific sentencing guidelines range in issuing his sentence. Because it is clear from the trial court’s remarks that it relied on the sentencing guidelines in imposing defendant’s sentence, the articulation requirement is satisfied. *Id.*

Defendant next argues that the prosecutor committed misconduct by making several statements unsupported by the evidence. We review defendant’s unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *Carines*, *supra* at 763-

764. Where a curative instruction could have alleviated any prejudicial effect reversal is not warranted. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *Ackerman, supra* at 450, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Ackerman, supra* at 450.

During his closing argument, the prosecutor stated that when defendant said, “I f---ed up,” he essentially admitted to committing the robbery. Later, the prosecutor said, “My feeling or my theory is that at some point in time the driver got out . . . and assisted with the armed robbery.” The meaning of the statement, “I f---ed up,” was a factual question to be resolved by the jury. Given the context in which defendant made the statement, it was a reasonable inference that the statement was an admission of guilt. Furthermore, a reasonable juror could have inferred from the testimony at trial that there were four occupants in the robbers’ car and that the driver exited the car sometime during the robbery. Moreover, the trial court cured any potential for error by instructing the jury, on more than one occasion, that the attorneys’ statements and arguments were not evidence. Defendant has not established that the prosecutor’s statements affected the outcome of this case. *Id.* at 449.

Defendant also asserts that the prosecutor committed further misconduct by stating that investigators found Edwards’ identification card in the maroon car located by Sergeant Porter. We disagree. The parties stipulated that Edwards’ driver’s license was “taken from the . . . car that’s in question.”

Defendant finally argues that the prosecutor committed misconduct when he withheld evidence of Edward’s driver’s license and several photographs from defense counsel in violation of MCR 6.201 and then moved to admit the evidence at trial. However, a review of the record does not reveal whether the prosecutor provided defense counsel with a description of those particular exhibits in response to defendant’s demand for discovery. Thus, there is no basis on the record to conclude that the prosecutor committed any misconduct. Moreover, considering that the challenged exhibits were only used to corroborate testimony, defendant cannot establish that the prosecutor’s misconduct affected the outcome of this case. Thus, even if error occurred, it did not affect defendant’s substantial rights.

Lastly, defendant argues that he was denied the effective assistance of counsel at trial. To establish ineffective assistance of counsel, defendant must show that defense counsel’s performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Defendant must show that, but for defense counsel’s error, it is likely that the proceeding’s outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel’s performance constituted sound trial strategy. *Id.*

Defendant argues that defense counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's alleged misconduct. In light of our conclusion that the prosecutor committed no misconduct, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also asserts that defense counsel expressed belief in defendant's guilt when he stated during his closing argument, "Yeah he [defendant] says he's f---ed. He sure is f---ed because he's with guys that committed an armed robbery." Contrary to defendant's assertion, defense counsel's statement did not express belief in defendant's guilt. Rather, in making this statement, counsel responded to the prosecutor's interpretation of the statement, "I f---ed up," by proposing an alternative interpretation. Further, considering that defendant admitted to being in the maroon car with Whorton, an identified robber, there is little doubt that defendant was in the company of "guys who committed an armed robbery." Counsel's arguments did not fall below an objective standard of reasonableness. Moreover, in light of the trial court's limiting instructions, defendant cannot establish that defense counsel's statement was outcome determinative. *Id.*

Defendant additionally argues that defense counsel was ineffective for failing to file a "notice of alibi" and call alibi witnesses. Defense counsel's failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). Defendant argues that defense counsel's failure to file a timely notice of alibi prevented several potential witnesses from corroborating his alibi defense. However, defendant failed to provide any information regarding his alleged alibi or the alleged alibi witnesses. Thus, defendant has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).¹

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

¹ Defendant has also requested a remand for further fact finding. Within the time for filing a brief, an appellant may move to remand the case when development of a factual record is required for appellate consideration, but the motion must be supported by an affidavit or offer of proof regarding the facts to be established. MCR 7.211(C)(1)(a)(ii). Defendant twice moved for a remand and both times this Court denied the motions. *People v Arnold*, unpublished order of the Court of Appeals, entered April 23, 2007 (Docket No. 271159); *People v Arnold*, unpublished order of the Court of Appeals, entered February 22, 2007 (Docket No. 271159). Even on appeal, defendant has failed to demonstrate that facts elicited during an evidentiary hearing would support his claim.